U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 30 March 2006

CASE NO.: 2005-LHC-2143

OWCP NO.: 07-134333

IN THE MATTER OF

ROBERT RIVERE, SR.,
Claimant

v.

SERVICE MARINE INDUSTRIES, INC.,
Employer

and

LOUISIANA WORKERS COMPENSATION CORPORATION,
Carrier

APPEARANCES:

Daniel J. Nail, Esq.,
On behalf of Claimant

David K. Johnson, Esq.,
On behalf of Employer/Carrier

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq*., (2000) brought by Robert Rivere Sr. (Claimant) against Service Marine Industries, Inc., (Employer) and Louisiana Workers' Compensation Corporation

(Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on December 12, 2005 in Covington, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced 3 joint exhibits (JTX 6,7, 8) which were admitted, including an assessment of Claimant's disability by treating physician, Dr. H, Carson McKowen dated August 2, 1997, stipulations; an injured worker's rehabilitation status report dated June 6, 1997 and a April 5, 1995 EMG report from Dr. Kenneth A Gaddis.[1] Employer called one live witness, vocational expert, Alan Lee Crane and introduced 5 exhibits which were admitted including labor market surveys of June 30, 1998; January 22, 1997 and November 13, 1996; joint motion to remand; work capacity evaluation dated January 29, 1996; functional capacity evaluation of January 10,11, 1996; and medical records from Drs. Cowen and McKowen.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. On August 5, 1994, Claimant was injured in the course and scope of his employment with Employer during which an employer/employee relationship existed.

2. Claimant's average weekly wage at the time of injury was $630.69.

3. Claimant has been paid temporary total disability from August 5, 1994 to present consisting of 589 weeks at $420.46 per week for a total of $247,590.88. Employer has paid medical benefits of $46,747.33.

4. Claimant reached maximum medical improvement on June 5, 1995.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Permanency of injuries.

[1] References to the transcript and exhibits are as follows: trial transcript- Tr.__; Joint exhibits- JTX-__, p. ; Employer exhibits- EX-__, p.__.

2. Suitable alternative employment.

3. Attorney's fees.

III. STATEMENT OF THE CASE

A. Chronology:

On August 5, 1994 Claimant injured his back while carrying a piece of steel. Dr. Bourgois of Morgan City provided initial treatment followed by Dr. Richard Morvant, and then, Dr. H. Carson McCowen who performed lumbar surgery in December, 1994. Following surgery Claimant underwent physical therapy, trigger point injections and pain medications under the supervision of Dr. Todd Cowen. [2]

The record contains progress notes dated January 29, February 12, May 24, June 24, July 26, November 8, 1996; April 24, May 14, October 14, 1997; April 2, 16, May 15, 22, October 16, 1998; April 16, October 12, 1999; January 11, April 11, July 11, October 10, 2000; January 9, April 5, July 6, October 2, December 28, 2001; June 27, October 17, 2002; January 16, August 5, November 18, 2003; February 19, May 14, August 9, November 8, 2004; February 4, and May 10, 2005. (EX-5). The progress note of January 29, 1996 indicates Claimant underwent another physical capacities evaluation indicating the ability to do sedentary work. However, following this assessment Claimant experienced considerable pain with palpable muscle spasm with Dr. McKowen opining Claimant's employability was almost nil limiting him to no more than part time sedentary work. (Id. at 35).

In a subsequent progress note of February 12, 1996, Dr. Cowen restricted Claimant as follows: lifting-5pounds frequently, 10-15 pounds occasionally with no repetitive lifting; standing 30 to 40 minutes continuously, 4 hours per day intermittently; walking 2-3 hours a day intermittently; sitting 30 to 40 minutes continuously, 4 hours total per day; static push-pull only; no bending or climbing. (Id. at 34).[3] As of the February 12, 1996 note, Claimant was assessed with chronic pain secondary to the back surgery and SI joint dysfunction for which he was prescribed Loratab, Elavil, and Flexeril.

On April 24, 1997, Claimant made a return visit to Dr. Cowen and informed Dr. Cowen that his workers compensation benefits had been drastically cut because of a FCE done in New

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[2] Many of Claimant's initial medical reports were not included in the record with the above summary obtained from EX-1, p 50.

[3] EX-3, a work capacity evaluation of Claimant by Dr. McCowen of January 29, 1996 sets for similar work restrictions with Claimant able to work 4-6 hours a day with Claimant at MMI as of June5, 1995. On January 10 and 11, 1996 Claimant underwent an FCE with Claimant complaining of lower back and right lower extremity pain and functioning at a restricted sedentary level with the examiner unable to ascertain basic lifting functions. (EX-4).

Orleans, which allegedly showed Claimant could perform sedentary work on a part time basis. Dr. Cowen and Dr. McCowen opined that Claimant's chances of being hired were basically nil with Dr. Cowen concluding that work was precluded due to Claimant's medicine which included Lortab (a scheduled narcotic) plus Flexeril, (a sedating muscle relax rant) and Elavil. On a subsequent visit of May 17, 1997, Dr. Cowen found Claimant in severe back and right leg pain, opined Claimant could not work due to his medicine and instructed him not to resume work without his approval. On Claimant's next visit of October 14, 1997, Claimant's condition remained unchanged, and Dr. Cowen opined Claimant was permanently and totally disabled. (Id. at 27).

On the April 2, 1998 visit, Dr. Cowen imposed additional work restrictions including not operating or being around heavy equipment/machinery and working at a location near his home because of Lortab which limited Claimant's driving ability. (Id. at 26). By Claimant's next visit of October 16, 1998, his condition had worsened with increase right leg pain. An October 12, 1999 progress note showed increased pain with Claimant unable to perform any activities for any extended period of time. (Id. at 20). On subsequent visits Claimant improved. However, as of the last visit of May 10, 2005, Claimant continued to have severe back and leg pain and remained on Lortab and Flexeril and in Dr. Cowen's opinion was permanently and totally disabled. (Id. at 36).

B. Labor Market Surveys

Vocational expert, Allen L Crane conducted a vocational assessment of Claimant on October 23, 1996 to determine Claimant's employment potentially allegedly relying upon medical records of Drs. Cowen, McKowen, an FCE from Crescent City Physical Therapy dated January 17, 1996 and rehabilitation reports from CorVel Corporation, personal interview and testing of Claimant. Mr. Crane found Claimant to have a limited education having dropped out of school at age 13 with past work as a commercial fisherman, horse jockey, welder/sandblaster, pipe and structural welder foreman, truck driver and finally for Employer as a welder from September,1992 through October 6, 1994, which were classified from light skilled to heavy unskilled.

Concerning Claimant's medical records, Mr. Crane noted that Dr. Cowen was monitoring Claimant's medication intake which included Lortab, Flexeril, and Elevil (spelling) and that in Dr. McKowen's opinion Claimant could '…return to work four to six hours per day, progressing to eight hours per day, with restrictions." Further, Claimant had reached MMI June 5, 1995. (EX-1, pp. 46-55). Mr. Crane found Claimant to have average intelligence, reading at the 7.6 grade level with math skills at the 6.2 grade level. Based upon all these factors Mr. Crane opined Claimant would be capable of light to sedentary work and recommended the job of dispatcher which was sedentary in nature allowing alternate sitting and standing; foreman in the welding/fabrication industry plus other possible supervisory positions. However, as of that assessment Mr. Crane had not conducted a labor market survey.

On January 22, 1997, Mr. Crane advised Claimant's counsel by mail of the following positions which he considered appropriate for Claimant based upon his age, education and work

history, and physical capabilities delineated by Dr. McKowen: recycle truck driver (driving a sanitation truck, sedentary to light work, alternate sitting, standing, walking, lifting less than 10 pounds, hours and rate of pay not mentioned); quality control inspector (inspecting parts/products, light work, alternate sitting, standing, and walking, lifting less than 20 pounds, hours and rate of pay not mentioned); service writer (estimating minor auto repairs for discount store, sedentary to light work with mostly sitting and alternative walking and standing, lifting less than 10 pounds, hours and rate of pay not mentioned); newspaper courier (delivering newspapers to subscribers, sedentary to light work with alternate sitting, standing, and walking, hours and rate of pay not mentioned); dispatcher (dispatching trucks in field, sedentary work with alternate sitting standing and walking, lifting less than 10 pounds, full time work with rate of pay not mentioned) (Id. at 43-45). In a letter to Carrier dated February 12, 1997, Mr. Crane indicated that the above positions allegedly accommodated the restrictions imposed by Dr. Cowen of February 12, 1996 and allowed part time work. Dr. Cowen restrictions as noted by Mr. Crane were as follows: lifting-5 pounds frequently, 10 to 15 pounds occasionally, no repetitive lifting; standing 30 to 40 minutes occasionally, four hours total per day intermittently; walking two to three hours a day intermittently; sitting- 30 to 40 minutes continuously, 4 hours total per day; static push/pull only; avoid bending and climbing. When describing the exert ional demand of these jobs, however, Mr. Crane classified all jobs except the dispatcher as light with the dispatcher position being sedentary in nature. (Id. at 39, 40).

On May 20, 1998, Mr. Crane wrote Dr. Cowen asking whether Claimant could perform t he recycle truck driver, newspaper carrier or dispatcher positions (transport dispatcher for two different companies in Houma, Louisiana). Dr. Cowen indicated Claimant was physically unable to perform the truck driver and newspaper carrier positions because of an inability to drive due to pain and use of narcotics. He found the transport positions unsuitable for the same reasons although physically Claimant could work 20 hours per week. Further, Dr. Cowen was concerned Claimant would not be able to qualify for the dispatching position due to Claimant's limited education. (Id at 33-35). On the same date Mr. Crane sent a similar letter to Dr. Mc Kowen which he never filled out. However, in a May 26, 1998 letter to Carrier, Mr. Crane indicated that Claimant could perform all these positions including that of delivery driver with the recycle truck driver, newspaper courier and delivery driver requiring light work relying not upon Dr. Cowen but upon restrictions imposed by Dr. McCowen. (Id. at 23-25).

On June 30, 1998 Mr. Crane sent Dr. Cowen another letter identifying additional positions available for Claimant including security guard (notifying front desk personnel of altercation, alternate sitting and standing and walking, lifting less than 5 pounds, working 20-40 hours per week); parts clerks (answering phones, assisting customers, alternate sitting, standing, and walking, occasional stooping and crouching, lifting 15 to 20 pounds, working 20 to 40 hours per week); counter clerk (pricing videos, assisting customers with movie selections, alternate sitting, standing and walking, occasional stooping and crouching, and lifting less than 5 pounds, working 15 to 20 hours per week); janitor (keeping office building clean, frequent standing, walking and occasional stooping and crouching, lifting less than 25 pounds, working 20 to 40 hours per week); and parts counter persons (answering phones and assisting customers, alternate sitting, standing and walking, lifting less than 20 pounds, occasional stooping and crouching, working 20 to 40 hours per week); and service technician(assembling circuit boards, lifting up to 20 pounds, working 20 to 40 hours per week. The only positions Dr. Cowen approved were

parts clerk and parts counter person and then only if lifting was less than 15 pounds with no stooping. (Id. at 13-16).

On September 14, 1998 Mr. Crane wrote Carrier advising of the following position available for Claimant and consistent with his age, education, work history and vocational testing: security guard, parts clerks, counter clerk , janitor, parts counter person and service person. Mr. Crane advised Carrier that Dr. Cowen had approved parts clerk and parts counter persons, but failed to note restrictions placed upon these positions by Dr. Cowen. (Id. at 1-5).

C. Claimant's Testimony

Claimant who lives in Thibodaux, Louisiana and has not worked since his injury in August 1994, testified about his back surgery with Dr. McKowen followed by trigger point injections and medications from Dr. Cowen, a pain management specialist. Dr. Cowen has been seeing Claimant on a regular basis prescribing Lortab, Flexeril, and Trileptal. Claimant testified he cannot drive any distance, completed the 7th grade and described his accident. (Tr. 13, 14).

On cross, Claimant indicated he was 60 years old and has not attempted to go back to work on instructions from his doctors. Claimant testified that he has driven from Thibodaux on occasion and could cut the grass with a self propelled mower, cook a little and wash dishes. (Tr.19, 20). However, last summer he had a car accident when he fell asleep at the wheel. (Tr. 21).

D. Testimony of Alan L. Crane

Mr. Crane testified he did his initial assessment of Claimant on October 23, 1996 and concluded Claimant could not return to welding, but could allegedly work as a recycle truck driver, quality control inspector, service writer, newspaper courier and dispatcher per a January, 1997, labor market survey. (Tr. 28). This was followed by a 1998 labor market survey, all of which were sent to Claimant's attorney. (Tr. 29, 31). Concerning Claimant's ability to work, Dr. McCowen according to Mr. Crane deferred to Dr. Cowen's assessment. (Tr. 32).

Concerning the dispatcher's position, Mr. Crane testified Claimant was qualified for that position from an educational standpoint and that Dr. Cowen had indicated both a "Yes" and "No" on this position and had indicated Claimant could do auto parts clerks and counter clerks positions. (Tr. 33.) Mr. Crane indicated he interpreted Dr. Cowen's comments about no stooping to mean occasional stooping for it was virtually impossible to avoid doing some stooping or bending throughout the day. (Tr. 34).

On cross Mr. Crane indicated that more than half of his work comes from Carrier with the remaining work coming from both plaintiffs and defendants. (Tr. 37, 38). Mr. Crane admitted not asking Dr. Cowen to clarify his comments about "no stooping". (Tr. 43, 47). Mr. Crane also admitted never seeing JTX-6, a statement from Dr. McCowen dated August 28, 1997, saying Claimant was totally disabled and would not make any improvement in the future or be

able to work. (Tr. 50). Mr. Crane also admitted that if Claimant could not bend he could do only the dispatcher position. (Tr. 53).

IV. DISCUSSION

A. Contention of the Parties

Employer/Carrier contends that Claimant is not permanently and totally disabled, but rather at most temporarily totally disabled, and more likely entitled only to lost earning capacity, since Employer/Carrier identified numerous jobs within Claimant's functional abilities which apparently constitute suitable alternative employment. Claimant made no attempt to secure such work, and thus, lacked the requisite "reasonable diligence" required by the Fifth Circuit under *New Orleans Gulf Wide Stevedores v. Turner*, 6612 F.2d 1031 (5th Cir. 1981). Employer/Carrier further argues that Mr. Crane was qualified as a vocational rehabilitation counselor to administer single scale screening tests of intelligence such as the Slosson Intelligence Test pursuant to LSAR.S. 37:3443(3)© to determine suitable alternative employment.

Claimant on the other hand argues that he clearly established a *prima facie* case of total disability by showing he could not return to his former work, thus, shifting the burden to Employer to establish suitable alternative employment. Employer failed to show the existence of any job which met the physical restrictions imposed by Drs. McKowen and Cowen which included driving restrictions due to use of prescribed narcotic pain killers. Claimant notes that as of May 14, 1997, Dr. McKowen, at EX-5, p. 28, found Claimant's use of Elavil, Lortab, and Flexeril to preclude any useful employment and advised him not to attempt work without first obtaining his approval and later on November 13, 1997, at JTX-6 found Claimant permanently and totally disabled.

B. Credibility of Parties

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467 (1968); *Louisiana Insurance Guaranty Ass'n v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1032 (5th Cir. 1998); *Atlantic Marine, Inc., v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law and supported by substantial evidence based on the record as a whole. *Banks*, 390 U.S. at 467; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183 (1999).

In this case I was impressed by Claimant's sincerity and testimony. While he testified he had driven from Thibodaux to Houma, Louisiana, I find this ill advised since it runs counter to his doctor's instruction against driving due to the use of prescribed narcotics. On the other hand I was not impressed by Mr. Crane's testimony concerning allegedly suitable alternative

employment. (SAE). While apparently he can administer the Slosson Intelligence Test in determining SAE, I find no basis for his disregard of Dr. McKowen's comments about the impact of narcotic medication on Claimant's ability to work. I also find no basis for his disregard of Dr. Cowen's opinion that use of narcotics affected Claimant's ability and no basis for his conclusion that Dr. Cowen's restrictions on no stooping meant only occasional stooping when on February 12, 1996 Dr. Cowen stated that Claimant should avoid bending which is necessarily involved with stooping.

C. Nature and Extent of Injury

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement. (MMI).

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981). In this case the parties stipulated and Dr. McKowen confirmed MMI as of June 5, 1995.

Concerning the extent of disability, the Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *P&M Crane Co., v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv., v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot ret urn to his former employment. *Elliot v. C & P Telephone Co.*, 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986). In this case the record is clear from the medical evaluations of Drs. McKowen and Cowan, that Claimant cannot perform his past work.

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (1988). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *SGS Control Serv.*, 86 F.3d at 444; *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). A finding of disability may be established based on a claimant's credible subjective testimony. *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 194 (5th Cir. 1999) (crediting employee's reports of pain); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-45 (5th Cir. 1991) (crediting employee's statement that he would have constant pain in performing another job). An employer may establish suitable alternative employment retroactively to the day when the claimant was able to return to work. *New Port News Shipbuilding & Dry Dock Co.*, 841 F.2d 540, 542-43 (4th Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294, 296 (1992). Where a claimant seeks benefits for total disability and suitable alternative employment has been established, the earnings established constitute the claimant's wage earning capacity. *See Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 233 (1984).

The Fifth Circuit has articulated the burden of the employer to show suitable alternative employment as follows:

> Job availability should incorporate the answer to two questions. (1) Considering claimant's age, background, etc.., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do? (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure? . . . This brings into play a complementary burden that the claimant must bear, that of establishing reasonable diligence in attempting to secure some type of alternative employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available.

Turner, 661 F.2d at 1042-43 (footnotes omitted).

Concerning Claimant's physical restrictions Dr. Cowen in progress note of February 12, 1996, Dr. Cowen restricted Claimant as follows: lifting-5pounds frequently, 10-15 pounds occasionally with no repetitive lifting; standing 30 to 40 minutes continuously, 4 hours per day intermittently; walking 2-3 hours a day intermittently; sitting 30 to 40 minutes continuously, 4 hours total per day; static push-pull only; no bending or climbing. Subsequently, Dr. Cowen included no driving and no stooping restrictions. None of the jobs identified by Mr. Crane including the security guard, parts clerks, counter clerk, janitor, parts counter person, service technician, recycle truck driver, newspaper carrier, dispatcher or delivery driver meet those restrictions. Thus Employer failed to show SAE. Claimant need not apply for inappropriate jobs.

D. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . ." *Grant v. Portland Stevedoring Company, et al.*, 16 BRBS 267 (1984).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director.

Effective June 5, 1995 Employer should have been paid Claimant permanent total disability pursuant to Section 908 (a) with appropriate annual cost of living increases pursuant to Section 910 (f).

E. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant permanent total disability compensation pursuant to Section 908(a) of the Act for the period from June 5, 1995 to present and continuing based on an average weekly wage of $630.39, and a corresponding compensation rate of $420.46 plus annual cost of living increases pursuant to Section 910 (f) effective October 1, 1995 and each October 1 thereafter.

2. Employer shall be entitled to a credit for all temporary total compensation paid to Claimant from August 5, 1994 to present.

3. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.

4. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

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CLEMENT J. KENNINGTON
Administrative Law Judge